In The Supreme Court of The United States

October Term, 1974

No. 74-540

FRED STEVE MENDRIN,

Petitioner,

v.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO

BRIEF OF RESPONDENT IN OPPOSITION

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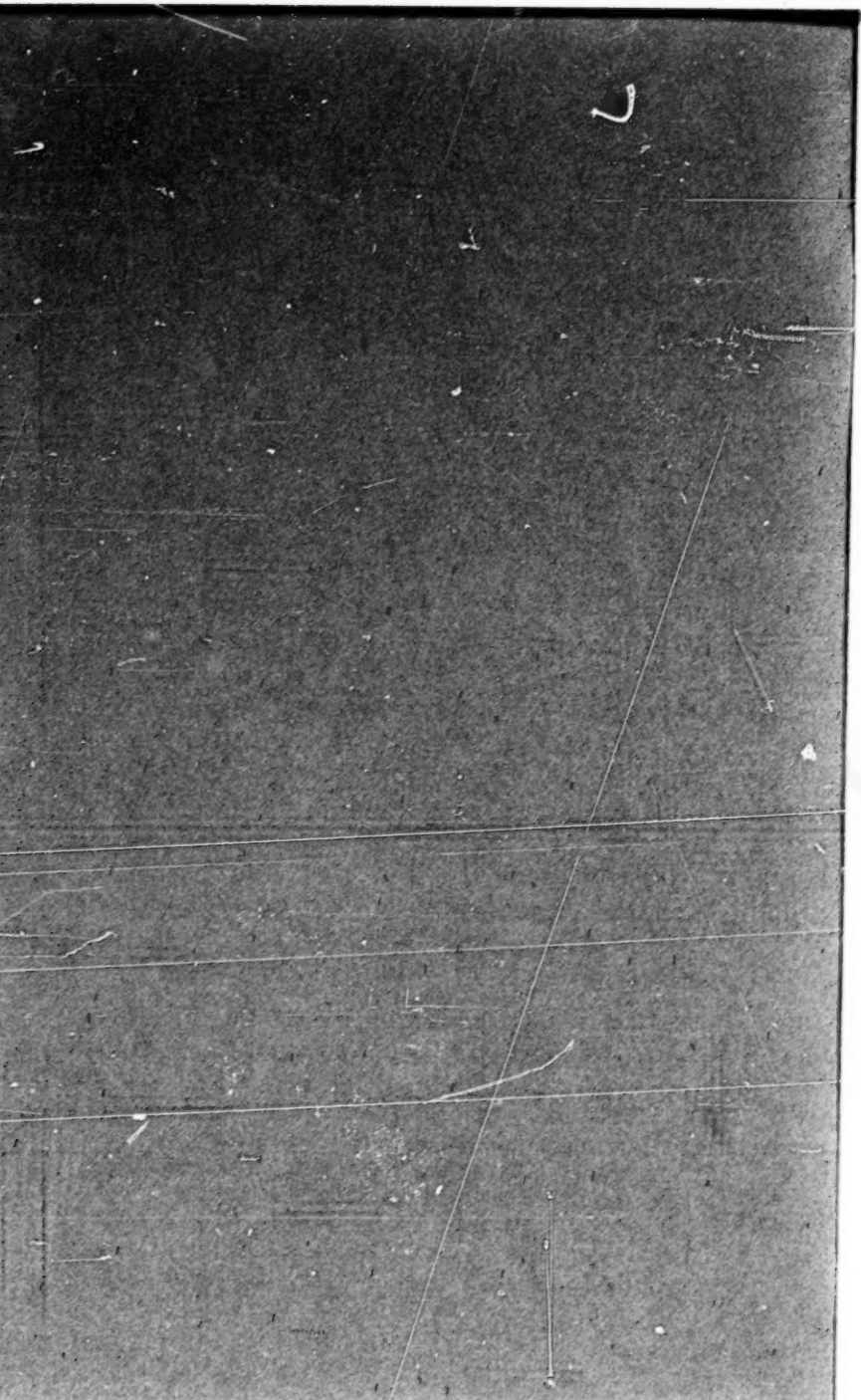

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BRIEF OF RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division Two, appears in Appendix A to the Petition.

QUESTIONS PRESENTED

1. Whether the trial court's ruling that petitioner, a high security risk charged with a calculated, violent crime, must wear leg irons during trial presents a substantial federal question.

2. Whether this Court has jurisdiction to entertain a challenge to the fairness of the trial on due process grounds because of the trial court's order limiting publication by the news media of the identity of the prisoner witnesses when petitioner failed to preserve the issue below.

3. Whether this Court has jurisdiction to review a contention not raised below regarding the trial court's exercise of its discretion in admitting certain relevant evidence.

4. Whether this Court has jurisdiction to entertain petitioner's contention he was deprived of due process when he was not permitted to personally examine confidential prison files when petitioner agreed below to the discovery techniques employed.

STATEMENT OF THE CASE

In an indictment returned by the Grand Jury of San Bernardino County on May 26, 1972, petitioner Fred Steve Mendrin and his co-defendant, Donald Ray Hale were charged with murder (California Penal Code section 187). (CT 1.) 1/

Petitioner pleaded not guilty and a jury trial commenced before Judge Garner. On November 29, 1972, the jury returned a

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1. As used herein "CT" refers to the Clerk's Transcript on appeal and "RT" refers to the Reporter's Transcript on appeal. We assume petitioner has furnished copies of these transcripts to the Court, but if he has not, and this Court so desires, respondent will make his copies available.

verdict finding petitioner guilty of murder in the first degree. (CT 5, 115.) On December 15, petitioner was sentenced to the state prison for the term prescribed by law. (CT 163-66.)

The judgment was affirmed on appeal by the California Court of Appeal for the Fourth Appellate District, Division Two on May 10, 1974. On August 7, 1974, a petition for hearing in the California Supreme Court was denied. Appendix B to Petition, p. 21.

The pertinent facts at trial were set forth in the Opinion of the California Court of Appeal, Fourth Appellate District, Division Two and can be found in Appendix A to the Petition, pp. 1-6. Pertinent facts may also be found in Sun Co. of San Bernardino v. Superior Court, 29 Cal. App. 3d 815, an Opinion of the California Court of Appeal, Fourth Appellate District, Division Two, involving one aspect of the trial in this case.

ARGUMENT

I

THE TRIAL COURT'S RULING THAT PETITIONER MUST WEAR LEG IRONS WAS NOT AN ABUSE OF ITS DISCRETION AND PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

In his first of four specific reasons for the granting of certiorari, petitioner contends he was denied a fair trial by the trial court's ruling that he was to wear leg irons during trial. Pet. 14-16.

Prior to trial, the question of whether petitioner was to wear leg irons arose and the court reserved ruling. The court suggested, however, ". . . that if a modesty panel were to be placed in front of the counsel table that there would be no prejudice to the defendants if they wore leg irons. . . ." (CT 13.) On October 24, the date trial commenced, petitioner was not in handcuffs or waist chains but was wearing leg irons and the court ruled petitioner was to be seated at counsel table before the jurors were brought in and was to remain seated until all of the jurors left the courtroom. The court then denied petitioner's motion to remove his leg irons. (CT 16.)

As petitioner acknowledges (Pet. 15), the law is well established that whether restraints are to be placed upon a defendant at his trial is a matter within the sound discretion of the trial judge. A long line of cases in California adhere to the view that it is the trial judge who is in the best position to determine what the relevant

factors are; to overcome the presumption of faithful performance of a judge's duty, the accused must show there was no basis whatsoever for the restraints employed. People v. Coleman, 32 Cal. App. 3d 853, 859; People v. Earl, 29 Cal. App. 3d 894, 900-01; People v. Pena, 25 Cal. App. 3d 414, 425-26; People v. Morris, 20 Cal. App. 3d 659, 666.

Similarly, federal courts, faced with this issue, have consistently taken the same position. See e.g. Kennedy v. Cardwell, 487 F. 2d 101, 107 (6th Cir., 1973); United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973); United States v. Roustio, 455 F. 2d 366, 371 (7th Cir. 1972); United States v. Samuel, 431 F. 2d 610, 614-16 (4th Cir. 1970); Woodards v. Cardwell, 430 F. 2d 978, 982 (6th Cir. 1970); Loux v. United States, 389 F. 2d 911, 919-20 (9th Cir. 1968); Gregory v. United States, 365 F. 2d 203, 205 (8th Cir. 1966); Way v. United States, 285 F. 2d 253, 254 (10th Cir. 1960). Thus, any variations in decisions are not because of a conflict in the law but merely in an application of the law to the facts of the particular case. Since the ruling in this case was after a careful review of the situation, it does not present a substantial federal question suitable for review on certiorari. United States v. Johnston, 268 U.S. 220, 227 (1925).

Furthermore, that ruling was correct and was not an abuse of discretion. Petitioner and his codefendant were convicted felons charged with a cold blooded, violent crime. Even before the killing they were designated as high security risks to be isolated from the remainder of the inmate population. (RT 131-32, 1460.) See also Sun Co. of San Bernardino v. Superior Court,

29 Cal. App. 3d 815, 819, n. 3. Furthermore, petitioner's codefendant had been convicted of escape twice, once with force. (RT 1370.) Since the trial judge admonished the jury to disregard the security precautions taken (RT 326-27), and since he attempted to prevent the jury from learning that petitioner was wearing leg irons, it can only be concluded the trial judge did not abuse his discretion.

II

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN A CHALLENGE TO THE FAIRNESS OF THE TRIAL BECAUSE OF THE ORDER RE PUBLICITY ON DUE PROCESS GROUNDS

Before and during the opening stages of the trial, the prosecution's motion to prohibit the press from publishing names and photos of prospective prosecution inmate witnesses was considered. This was described by the Court of Appeal in Sun Co. of San Bernardino v. Superior Court, supra, 29 Cal. App. 3d at 817-21. At first, the motion was denied. (RT 12.) Prior to this ruling, petitioner opposed any gag order on the ground he did not want to be a party to anything which would ". . . restrict the press from printing fair, accurate information concerning this case, whatever that information may be." (RT 10.) Later, petitioner pointed out there were no complaints presented from the inmate witnesses about possible publicity of their names and police reports were available to the defense which contained the names of the witnesses. (RT 46-47.) Finally, petitioner argued the People had not presented any factual declarations under penalty of perjury. (RT 106.) Ultimately,

the court issued an order prohibiting the news media from printing for approximately six months the names and photographs of several inmate witnesses who were to be called by the prosecution. (RT 112-17.)

Several newspapers sought appellate relief. On January 4, 1973, the California Court of Appeal for the Fourth Appellate District, Division Two, in Sun Co. of San Bernardino v. Superior Court, supra, 29 Cal. App. 3d 815, held the order was unconstitutional following petitioner's conviction.

Following his conviction, petitioner appealed to the same court and argued in his opening brief the gag order violated his right to a public trial. The People responded to the public trial issue and the Court of Appeal held petitioner was not denied his right to a public trial. See Appendix A to Petition, pp. 6-8.

Petitioner now argues the unconstitutional gag order deprived him of a fair trial and due process of law guaranteed to him by the Sixth and Fourteenth Amendments to the United States Constitution. Pet. 17-19. He apparently abandons his public trial argument. Yet he failed to properly present his fair trial and due process grounds to the California courts and have those courts pass upon the issue. Accordingly, this Court is without jurisdiction to consider this issue. Beck v. Washington, 369 U.S. 541, 549-53 (1962); Food Employees v. Logan Plaza, 391 U.S. 308, 334 (1968) (Harlan, J. dissenting).

Further, petitioner's argument is inconsistent with his position taken at trial. Here, petitioner's position is the Sixth and

Fourteenth Amendments insure ". . . that any potential recipient of such information distributed by the free press media who has contradictory testimony might come forward and disclose such contradictory information." Pet. 17. This absence of publicity, he continues, deprived him of a fair trial and due process of law. Petitioner did not make this argument at trial. There, he argued the gag order would have had no effect.

> "Secondly, I would point out both of the defendants have had copies of all of the police reports made available to the defense for many, many months and had them at a time when they themselves have remained in the institution in Cypress Hall in particular and it would seem to me if anyone was interested in learning these names they would have found out a long time ago who are the principle people." (RT 46-47.)

Obviously, petitioner can not have it both ways.

In any event, the impact this gag order had on petitioner's trial was simply inconsequential and purely speculative. The order was carefully limited to prohibit the publication only of prosecution inmate witnesses' names and photographs. In all other respects, the press was unencumbered and as a result, the trial was well publicized. Appendix A, Pet. p. 8. The defense knew who the witnesses were months in advance of trial. (RT 47.) Consequently, petitioner's attorney was permitted to travel and received authorization for expenses to travel to San Luis Obispo, San Quentin, and Folsom to interview inmates in those facilities. (CT 24-25.)

Consequently, the very minute impact the order re publicity could have had upon this trial -- this was recognized by petitioner's codefendant's trial attorney (RT 49) -- lead to the inevitable conclusion petitioner was not denied due process of law.

III

THIS COURT DOES NOT HAVE JURISDICTION TO DETERMINE IF PETITIONER'S RIGHT TO FREEDOM OF ASSOCIATION WAS INFRINGED

The prosecution at trial sought to establish a motive for the killing of Castillo. Paul Dobreaff described the Aryan Brotherhood, the American Nazi Party, and other prison organizations and testified that to his knowledge, the Aryan Brotherhood had a contract out on Castillo's life. (RT 740.) Petitioner admitted he was a member of the Aryan Brotherhood. (RT 1491.) That organization, according to Dobreaff, frequently worked in conjunction with other violence-prone organizations. Thus, Louis Pettijohn's testimony of the prior attempt by other members of the Aryan Brotherhood to kill Castillo (RT 588-93, 1315), in light of the background of the organization, tended to show Castillo was in great danger from members of the Aryan Brotherhood. From the prosecution's point of view, this would explain petitioner's participation in the killing and thereby provide a motive for the killing.

Petitioner contends his First Amendment right to freedom of association, his Sixth Amendment right to a fair trial, and his

Fourteenth Amendment right to due process of law and equal protection of the laws were *infringed by this evidence. Pet. 19-22.* Petitioner did not take this position at trial or before the Court of Appeal. It was petitioner's argument in the state courts that since he did not participate in the previous attempt on Castillo's life and had no knowledge of it, the evidence was not relevant and was prejudicial. (RT 570-72.) The trial judge exercised his discretion and admitted the evidence (RT 575); the Court of Appeal agreed (Appendix A to Pet., pp. 15-16). It follows that this Court is without jurisdiction to entertain petitioner's constitutional argument. Beck v. Washington, supra; Food Employees v. Logan Plaza, supra.

Contrary to petitioner's characterization, the issue herein presented is not at all one of constitutional proportion; it is one requiring review of a trial judge's exercise of discretion on an evidentiary matter. More particularly, the question is whether the evidence was relevant on the issue of motive. At this stage, the question is whether the trial court abused its discretion. Scales v. United States, 367 U.S. 203, 256 (1961); United States v. Catalano, 491 F. 2d 268, 273-74 (2nd Cir. 1974); United States v. French, 470 F. 2d 1234, 1239 (D.C. Cir. 1973). And since the trial court carefully reviewed the proffered evidence before ruling (RT 570-75), no federal question suitable for review on certiorari is presented. United States v. Johnston, supra.

Relevant evidence, of course, is admissible. Cal. Evid. Code §351. Evidence is relevant when it logically and by reasonable inference tends to establish any fact.

Generally, judges are given wide latitude in determining the relevancy of proffered evidence. United States v. Catalano, supra, United States v. Marlin, 471 F. 2d 764, 766 (7th Cir. 1972); United States v. Craft, 407 F. 2d 1065, 1069 (6th Cir. 1969). Evidence of motive to kill is certainly relevant and its admissibility is within the trial court's discretion. Barbeau v. United States, 193 F. 2d 945, 950 (9th Cir. 1951); United States v. Bomwell, 467 F. 2d 895, 896-97 (3rd Cir. 1972); United States v. Kwitek, 467 F. 2d 1222, 1225 (7th Cir. 1972).

From the evidence of the prior attack on Castillo by other members of the Aryan Brotherhood, from petitioner's membership in the Aryan Brotherhood, and Dobreaff's testimony of a contract on the life of Castillo, the prosecution asked the jury to infer that petitioner would be expected to participate in the killing because he was a member of an organization engaged in violence and that organization wanted Castillo dead. The jury, as trier of fact, was not obligated to accept this theory (CT 121, 132) although it was bound to consider the evidence only as it related to motive or credibility (CT 151). On appeal, the California Court of Appeal was bound to adopt this theory if it were reasonable. People v. Redmond, 71 Cal. 2d 745, 755. It did, but petitioner now objects. Pet. 21. Yet the inference, by providing a motive for an otherwise senseless killing, is a reasonable and proper one and is certainly not the type of evidence which infringes upon one's right to freedom of association or one's right to a fair trial. United States v. Rosenberg, 195 F. 2d 583, 595-96 (2nd Cir. 1952); see also Scales v. United States, supra, 367 U.S. at 256-57.

IV

THIS COURT DOES NOT HAVE JURISDICTION TO ENTERTAIN PETITIONER'S CONTENTION HE WAS DEPRIVED OF DUE PROCESS WHEN HE WAS NOT PERMITTED TO PERSONALLY EXAMINE CONFIDENTIAL PRISON FILES

Petitioner sought discovery of evidence in two broad areas before and during trial. One was a motion for discovery of the inmate files of the prosecution protective custody witnesses. This motion was apparently denied prior to trial and renewed during trial. The court denied the motion on the ground the evidence sought lacked relevancy. (RT 895-86.) Leaving aside the issue of relevancy (for a discussion of this aspect of the issue, see RT 93-96), the fact remains the information sought from the prosecution inmate witnesses' central files maintained by the California Department of Corrections was confidential and should not have been disclosed. Procunier v. Superior Court, (Losoya) 35 Cal. App. 3d 207. Petitioner apparently has abandoned this argument.

The second request for discovery also involved disclosure of confidential information which could have been prevented had the District Attorney asserted that privilege. This motion for discovery involved information concerning any assaultive incidents to which Castillo may have been involved either as an aggressor or as the victim. (RT 1106-07.) A discussion followed the motion for discovery wherein it was recognized that the state had a legitimate interest in keeping some information from a file confidential (RT 1108-10); a claim of confidentiality would then require an in camera

hearing before the trial judge. See generally People v. Superior Court (Biggs), 19 Cal. App. 3d 522. However, the District Attorney pointed out that the file could be quite lengthy and might require a great deal of time to review. The court then directed that Mr. Coffman, a representative from the California Department of Corrections

> ". . . should go into that file and select those matters out and that he himself then at some point perhaps next week during a recess is going to be placed under oath and we are going to ask him under oath if he has selected those matters and that way he might find them for me." (RT 1111.)

No objection to this procedure was made by petitioner; in fact, he expressed confidence everything would be worked out. (RT 1113.)

Apparently everything was worked out. Shortly thereafter, the District Attorney reported that he had inspected Castillo's file and delivered to defense counsel all relevant reports. The District Attorney was prepared to have Mr. Coffman testify under oath. However, the defense accepted the District Attorney's representation and again no objection to what had transpired was made. (RT 1165.)

Petitioner now argues the solution fashioned by the trial judge was unfair. His position is the District Attorney could not adequately view the file from the defense point of view and such a procedure is inconsistent with the adversary process. He also argues he was denied his right of confrontation and cross-examination.

Pet. 22-25. As shown, no objection to the solution reached by the trial court was made at trial; since none was made, the Court of Appeal quite appropriately concluded petitioner was satisfied with this solution and therefore did not determine whether the solution was a proper one. Appendix A to Pet. p. 14. Thus, the issue has not properly been preserved and this Court is without jurisdiction to entertain it. Beck v. Washington, supra, 369 U.S. 541, 549-53; Food Employees v. Logan Plaza, supra, 391 U.S. 308, 334.

The trial court's solution was manifestly fair. The interests of California in maintaining its inmate files confidential is clearly justified. See Procunier v. Superior Court (Losoya), supra, 35 Cal. App. 3d at 209, n. 1. The District Attorney was well aware of this. (RT 1108.) On the other hand, the defense presented reasons why the file might contain information necessary for the defense and therefore should be disclosed. To solve this difficult problem and balance the competing interest, the trial court ordered a California Department of Corrections representative to examine the file for possible relevant information and report back, under oath. (RT 1111.) In light of the fact petitioner did not express dissatisfaction with this procedure, it cannot be concluded due process requires any more. Wardius v. Oregon, 412 U.S. 470, 474 (1973).

CONCLUSION

For the foregoing reasons, we respectfully request the Petition for Writ of Certiorari be denied.

Respectfully submitted

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